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No. 85-1450

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1985

WILLIAM HORTON,

Petitioner,

vs.

MILLER CHEMICAL COMPANY, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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RULE

Rule 50, Federal Rules of Civil Procedure 3, 4

TEXT

Stern & Gressman, SUPREME COURT PRACTICE (4th Edition 1969), Sec. 4.14, p. 172 4

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STATEMENT OF THE CASE

This is a diversity action for retaliatory discharge under Illinois law. Specifically, petitioner (plaintiff) claimed that respondent (defendant) terminated his employment "for seeking medical care . . . and for his medical inability to work" in violation of the Illinois Workers'

Compensation Act. [Complaint, par. 11]. The case was tried before a jury and the district court in denying defendant's motion for a directed verdict stated:

> I think as I indicated earlier this is a close question on the directed verdict but there is evidence in this case that what he was told was that he was being terminated because he was a bad risk, not that he was unable to perform the work but that he was a bad risk. 'Risk' can be argued in terms of meaning. *I don't know what it means* but it is certainly open to argument. [TR. 155 (emphasis added)].

Thereafter the jury found for plaintiff and awarded compensatory damages in the amount of $74,824 and punitive damages in the amount of $100,000. The district court denied defendant's post trial motions and it appealed. After thoroughly reviewing Illinois law applicable to directed verdicts, judgments notwithstanding the verdict and the Illinois tort of retaliatory discharge, the court of appeals reversed. The 7th Circuit Opinion [Appendix to Petition A1-A17] observed that "in this case, there are no disputed facts" and that it is appropriate "for resolution by directed verdict or JNOV."/[1] [Pet. App. A12]. Its opinion exhaustively reviews the undisputed facts and states "The district judge held, and we agree, that plaintiff's testimony about 'bad risk' was the only evidence that even hinted that defendant's motives in discharging the plaintiff were linked to the (Illinois Workers' Compensation) Act" [Pet. App. A12] and concludes:

> Thus most of the evidence presented at trial including that presented by the plaintiff, demonstrated that the plaintiff did indeed suffer from a back problem that

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[1] Judgment notwithstanding the verdict.

prohibited him from working as a truck driver/delivery man and that he pursued all of his rights under the Act without opposition or interference by the defendant. In light of all this evidence,[10]/[2] the plaintiff's own testimony with respect to the defendant's ambiguous statement regarding 'bad risk', and his other evidence regarding how he may have been discharged unjustly were simply insufficient to support the jury's verdict that the plaintiff was a victim of retaliatory discharge. [Pet. App. A15].

—o—

STATEMENT OF FACT

Judge Swygert's opinion for the 7th Circuit accurately states the relevant fact.

—o—

REASONS FOR DENYING THE WRIT

In summary, petitioner's contention is that the directed verdicts and/or judgments notwithstanding the verdict contemplated by Rule 50 of the Federal Rules of Civil Procedure somehow offends the Seventh Amendment to the Constitution of the United States. Any such notion of constitutional trespass was long ago laid to rest in

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2 [10] refers to footnote [10] in 7th Circuit opinion which states: "I.e., plaintiff's admission that he told Dunham he could do 'no more lifting,' his own testimony regarding the condition of his back, his own failure to testify that on April 27, 1981 he objected to his discharge, his own failure to contact the defendants after he was discharged, Dunham's and Hoffman's highly inconsistent testimony, Garwacki's deposition, the documentary evidence, and the fact that Dunham never said to the plaintiff anything that even remotely smacked of retaliation other than a 'bad risk.' "

Galloway v. United States, 319 U.S. 372 (1943). There the Court declared: "If the intention is to claim generally that the (7th) Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century.[3] More recently the practice has been approved explicitly in the promulgation of the Federal Rules of Civil Procedure, Cf. Rule 50, Berry v. United States, 312 U.S. 458."

In support of his contentions, petitioner relies heavily upon and adopts by reference the Petition for Writ of Certiorari in *Craft v. Metromedia, Inc.* (United States Supreme Court No. 85-1053)[4] but the Petition in that case was denied on March 3, 1986.

As stated in Stern & Gressman, SUPREME COURT PRACTICE (4th Edition 1969) Sec. 4.14, page 172:

> The Supreme Court will usually deny certiorari when review is sought of a lower court decision which turns solely upon an analysis of the particular facts involved . . . 'We do not grant a certiorari to review evidence and discuss specific facts.' *United States v. Johnston*, 268 U.S. 220, 227.

Moreover, under Illinois law concerning the tort of retaliatory discharge, the decision of the court of appeals

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[3] Citing: Parks v. Ross, 11 How. (U.S.) 362; Schuylkill & D. Improv. & R. Co. v. Munson, 14 Wall (U.S.) 442; Pleasants v. Fant, 22 Wall (U.S.) 116; Marion County v. Clark, 94 U.S. 278; Ewing v. Goode, 78 F. 442 (CC).

[4] For the most part the questions presented and reasons for granting the writ here are almost identical to those as stated in the *Craft v. Metromedia, Inc.* (No. 85-1053) Petition.

was not only permissible—it was required. *Slover v. Brown,* 140 Ill.App.3d 618, 488 N.E.2d 1103 (1986) is an Illinois retaliatory discharge case which finds in favor of the defendant-employer. There, the court framed the question thusly, "How far must an employer go to furnish a job to an employee who has collected under Workers' Compensation Act of Illinois in order to avoid being sued for retaliatory discharge" and declared:

> It has been held that the elements of retaliatory discharge are as follows: (1) plaintiff's status as an employee of defendant before injury; (2) plaintiff's exercise of a right granted by the Act; (3) employee's discharge causally related to the filing of a claim under the Act. Causality does not exist if the basis for discharge is valid and nonpretextual. (*Hansome v. Northwestern Cooperage Co.* (Mo. 1984), 679 S.W.2d 273 (*en banc*).) Thus, an employer may fire an employee for excessive absenteeism, even if the absenteeism is caused by a compensable injury. (*Clifford v. Cactus Drilling Corp.* (1984), 419 Mich. 356, 353 N.W.2d 469.)

In this case the following facts are neither contradicted nor discredited and must be taken as true:

1. "(T)hat the plaintiff did indeed suffer from a back problem that prohibited him from working as a truck/driver delivery man" as of April 28, 1981. [Pet. App. A15].

2. That plaintiff pursued all of his rights under the Illinois Workers' Compensation Act "without opposition or interference by the defendant". [Pet. App. A15].

3. That plaintiff's employment was terminated on April 28, 1981 because the "opinion of his doctor ren-

dered him unable'' to perform his work. [Ptf's Ex. 4, Complaint, Par. 11].

4. That plaintiff never requested reemployment nor otherwise contacted defendant after April 28, 1981. [Ptf's Testimony TR. 88-89].

Accordingly, it is clear that the 7th Circuit's decision was palpably mandated under Illinois law.

CONCLUSION

For these and other reasons implicit therein, the petition for certiorari should be denied.

Respectfully submitted,

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